INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	10

CITATIONS

Cases:

Bolich v. *Rubel*, 67 F. 2d 894 — 9

Boren v. *Tucker*, 239 F. 2d 767 — 9

Colton, Application of, 291 F. 2d 487 — 6

De Masters v. *Arend*, 313 F. 2d 79 — 6

Goldstein v. *United States*, 316 U.S. 114 — 7

Lash v. *Nighosian*, 273 F. 2d 185, certiorari denied, 362 U.S. 904 — 9

Magnus, Mabee & Reynard, Inc., In re, 317 F. 2d 12, certiorari denied, April 29, 1963 — 9

Norda Essential Oil & Chemical Co. v. *United States*, 253 F. 2d 700 — 9

Oklahoma Operating Co. v. *Love*, 252 U.S. 331 — 7

Rogers v. *United States*, 340 U.S. 367 — 7

United States v. *O'Connor*, 118 F. Supp. 248 — 9

Constitution and Statutes:

Constitution of the United States:

Fourth Amendment — 6

Fifth Amendment — 6

439323—63——1

Constitution and Statutes—Continued

	Page
Internal Revenue Code of 1954 (26 U.S.C.):	
Sec. 7210	6
Sec. 7602	2
Sec. 7604	6
Miscellaneous:	
Wigmore, *Evidence* (3d ed.) § 2321	8

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1084

SAMUEL REISMAN, ET AL., PETITIONERS

v.

HON. MORTIMER M. CAPLIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT CAPLIN IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (Pet. 10a–14a) and the opinion of the court of appeals (Pet. 3a–9a) have not been reported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1963 (Pet. 9a). The petition for a writ of certiorari was filed on May 8, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' complaint, which asked for an order quashing an Internal Revenue Service summons and enjoining the Commissioner of Internal Revenue from attempting to enforce the summons by court action, constituted a suit against the United States to which the United States has not consented.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce

such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

STATEMENT

Petitioners instituted the present action on July 7, 1961, by filing a complaint in the District Court for the District of Columbia asking declaratory and injunctive relief against respondent Caplin, the Commissioner of Internal Revenue (R. 2–16).[1] The allegations of the complaint and an accompanying affidavit may be summarized as follows:

In April 1960 petitioner Reisman, an attorney who has represented a taxpayer named Bromley for over ten years, associated the other three petitioners with him as associate counsel in connection with Bromley's tax liabilities (R. 2–5): In preparing for the trial of cases pending in the Tax Court involving Bromley's liabilities for the years 1953 to 1956, and also in view of possible criminal prosecution, petitioners decided they needed skilled accounting advice and engaged respondent Peat, Marwick, Mitchell & Co., which has offices in Chicago, Los Angeles, and New York (R. 3, 5). Thereafter Peat, Marwick, under the supervision of petitioners, analyzed the original records of Bromley and his numerous corporations, and kept all pertinent material segregated and labeled as the property of petitioners (R. 5–6, 44–46). There was a

[1] "R." refers to the joint appendix in the court of appeals.

tentative agreement to make some of this material available to the Internal Revenue Service for the purpose of settling the Tax Court cases, but when Bromley was warned by the Service that a criminal investigation was pending he refused to allow anything to be turned over (R. 6–7, 46). On June 13, 1961, respondent Caplin caused summonses to be served on Peat, Marwick, directing the firm to produce audit reports and work papers relative to Bromley's taxes for the years 1957 to 1959, and to produce all books and records of the numerous corporations for the years 1953 to 1959 (R. 7–8, 19–40).

Petitioners alleged in their complaint that enforcement of the summonses would violate the constitutional rights of their client, Bromley, in that it would be an unreasonable seizure, could force him to incriminate himself, and would deprive him of due process by revealing to the government the preparations his counsel had made for the Tax Court cases (R. 8–10, 46). The complaint prayed that respondent Caplin, "his successors in office and each of his or their officers, agents, assistants and employees, including (but not limited to), Revenue Agents and Special Agents throughout the United States and abroad, and all attorneys and anyone associated with or acting in concert or participating with him, and his successors in office," be enjoined from seeking enforcement of the summonses by court action (R. 14–15).

The district court dismissed the complaint, holding that petitioners had no standing to sue, that the

records were the work product of Peat, Marwick rather than of petitioners, and that production of the records sought would not violate the attorney-client privilege (Pet. 13a). The court of appeals affirmed the dismissal of the complaint on a different ground. After noting that the complaint was against the Commissioner of Internal Revenue in his official capacity (Pet. 6a), the court held that the suit was in substance one against the United States to which it had not consented, and was therefore prohibited under the doctrine of sovereign immunity (Pet. 6a–7a). While recognizing the right to sue an officer of the United States as an individual where the acts complained of are beyond the scope of his authority, the court held that Section 7602 of the Internal Revenue Code, pursuant to which the instant summonses were issued, "clearly authorizes" the Commissioner to proceed as he did in this case (Pet. 6a). The court therefore concluded (Pet. 7a):

> [I]n this case the Commissioner does not appear as yet to have departed from his statutory authority, to say nothing of having so departed as to justify interpreting the suit to be one against him personally, rather than in substance and effect against the United States. In so viewing the matter we have in mind that the effort is to stop the United States, acting through the Commissioner, his successors and agents, from initiating further steps to obtain documents which the persons summoned cannot be compelled to produce unless and until enforcement proceedings are pursued.

ARGUMENT

The court of appeals held that petitioners' action was barred by sovereign immunity. This holding admittedly raises questions of some difficulty.[2] However, these questions need not, and should not, be decided in this case since petitioners' action is plainly without merit on other grounds.

Petitioners contended in their complaint that the Commissioner cannot compel production of the records and work papers on a series of grounds. They contend that enforcement would constitute an unreasonable search and seizure in violation of the Fourth Amendment (R. 8, 9–10); would require Bromley to incriminate himself in violation of the self-incrimination clause of the Fifth Amendment (R. 8); and would violate the due process clause of the Fifth Amendment because they were the work papers of Bromley's attorneys and accountants (R. 9).[3] All of

[2] The Ninth Circuit in *De Masters* v. *Arend*, 313 F. 2d 79 (Pet. 17a–33a), has suggested in dictum that sovereign immunity does not apply to suits where the taxpayer alleges that the summons was without statutory authorization or was unconstitutional. The Second Circuit has held in *Application of Colton*, 291 F. 2d 487 (Pet. 33a–40a), that sovereign immunity does not apply in cases involving actions to quash the summons brought by a recipient of the summons since refusal to obey would subject that person to criminal penalties under Sections 7210 and perhaps 7604(b) of the Code. This decision is not relevant here, however, since petitioners did not receive the summonses and therefore can not possibly be subjected to any criminal penalties.

[3] Petitioners also complained that the summonses violated various treaties and were invalid because they were directed to partnerships rather than individuals (R. 9). These contentions, however, have been abandoned on appeal and are not raised in the petition for certiorari.

these contentions involve the constitutional rights of Bromley or possibly of his accountants, but not of his attorneys. The alleged unreasonable search and seizure could violate at most only the privacy and security of Bromley and the accountants to whom the papers belong. It is only Bromley who could be incriminated. And the allegation as to the work papers of the accountants is that Bromley's right to the effective assistance of counsel will be violated if the Internal Revenue Service obtained the work product of his counsel. Since it is well established that a person cannot raise the rights of other individuals under the Fourth and Fifth Amendments, petitioners' contentions are clearly erroneous. *E.g., Goldstein* v. *United States,* 316 U.S. 114, 121; *Rogers* v. *United States,* 340 U.S. 367, 370–371.[4]

Petitioners now raise arguments: that the summonses violated Section 7602 of the Code, *supra,* pp. 2–3, because they were designed to obtain evidence in pending Tax Court cases and a possible criminal prosecution (Pet. 7–8) and that they interfered with the attorney-client privilege (Pet. 9–10). Since these contentions were raised for the first time on appeal,

[4] Petitioners say (Pet. 7) that their complaint alleged that Commissioner Caplin had exceeded his statutory powers by issuing the summonses "for the sole purposes" of obtaining the results of their preparation for the trial of the Tax Court cases and of obtaining evidence to be used in a criminal case against Bromley. But the complaint in fact contained no allegation that these were the "sole purposes" for the issuance of the summonses. Moreover, the facts stated in the complaint suggest the contrary. The Tax Court cases involve Bromley's individual liabilities for 1953 to 1956 (R. 5, 17), whereas the summonses had to do with Bromley's liabilities for 1957 to 1959 and corporate liabilities for 1953 to 1959 (R. 19–40).

they are not properly before this Court. Moreover, petitioners cannot bring an action to enforce the attorney-client privilege since the privilege belongs primarily to the client. See Wigmore, *Evidence* (3d ed.), § 2321. While an attorney can, and indeed must, invoke it in defense when a demand is made on him, the responsibility is on the client to raise the privilege when a demand is made on others. At least this is true when, as appears here, the client is available and can easily bring an action if he desires, against the accountants.

Petitioners' contention that the summonses were invalid as not authorized by the Code is likewise without merit. Petitioners do have the authority to raise this issue since, if the summonses were unauthorized, the Commissioner had no right to make the demand on the accountants. This means that petitioners, as the bailees of Bromley's records, are entitled to the records vis-a-vis an interloper attempting to obtain the records from a sub-bailee. However, even if petitioners may properly raise these issues, their contention are without merit. It is not an excess of

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[6] Petitioners' other contentions (which we discussed above), even if correct, would not make the summonses invalid. Bromley's constitutional rights and his rights to the protection of the attorney-client privilege and of the work product of his accountants are not infringed by the issuance of the summonses. Such rights can only be violated if the summonses are enforced or a person is convicted for refusal to comply with them, despite the invocation of these rights. If Bromley decided not to claim his constitutional rights or privileges, the summonses would have to be obeyed.

authority to issue a summons merely because the information obtained could be used in some future criminal proceeding. *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12, 14–17 (C.A. 2), certiorari denied, April 29, 1963; *Lash* v. *Nighosian*, 273 F. 2d 185, 187–188 (C.A. 1), certiorari denied, 362 U.S. 904; *Boren* v. *Tucker*, 239 F. 2d 767, 772–773 (C.A. 9).[6] The Commissioner is likewise entitled to issue summonses to obtain information for use in pending Tax Court cases. *Norda Essential Oil & Chemical Co.* v. *United States*, 253 F. 2d 700 (C.A. 2); *Bolich* v. *Rubel*, 67 F. 2d 894 (C.A. 2). Furthermore, since the Tax Court cases have now been tried and are awaiting decision,[7] there is no longer any reason for interfering with enforcement of the summonses because of the pendency of those cases. In short, it is clear that the Commissioner did not exceed his statutory authority.[8]

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[6] *United States* v. *O'Connor*, 118 F. Supp. 248 (D. Mass.), upon which petitioners rely (Pet. 11–12), is inapposite, for there the government admitted that the sole purpose of the summons was to support a criminal prosecution in which an indictment had already been returned. See *Boren* v. *Tucker*, 239 F. 2d 767, 772–773 (C.A. 9).

[7] See Application for Stay of Mandate of Court of Appeals (p. 8), filed in this Court on March 20, 1963, and denied by the Chief Justice on March 23, 1963.

[8] Apart from the contentions made above and from the holding of the court of appeals, the government submits that petitioners' complaint was also barred because (1) Congress has provided that the exclusive remedy for resisting summons is to refuse to obey them and then resist criminal prosecution or enforcement of the summons under Sections 7210 and 7604 of the Code; and (2) petitioners' various claims, as the district court held (Pet. 13a), are without substance on their merits.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
JOSEPH M. HOWARD,
NORMAN SEPENUK,
Attorneys.

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